Petition

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SUPREME COURT, U.S.

NO. 81 5134

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WOODROW BARKSDALE, II,
PETITIONER,

VS.

FRANK C. BLACKBURN, WARDEN,
LOUISIANA STATE PENITENTIARY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WOODROW BARKSDALE, II
PMB#084275 ASH -2-
LOUISIANA STATE PENITENTIARY
ANGOLA, LOUISIANA 70712

JULY, 1981
ANGOLA, LOUISIANA 70712

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WOODROW BARKSDALE, II,
Petitioner,

VS.

FRANK C. BLACKBURN, WARDEN,
LOUISIANA STATE PENITENTIARY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, WOODROW BARKSDALE, II, prays that a writ of Certiorari issue to review the opinion and judgment of the United States Court of appeals for the Fifth Circuit rendered in these proceedings on June 12, 1981.

OPINIONS BELOW

The opinion of the Fifth Circuit dismissing petitioner's appeal is not reported. However, a copy of the decision is attached marked 'Exhibit "A" '.

The opinion of the United States District Court for the Eastern District of Louisiana, The Honorable James D. Carriere, rendered on July 29, 1980, is not reported, but a copy of the decision is attached, marked 'Exhibit "B" '.

The United States District Court for the Eastern District of Louisiana granted probable Cause on September 18, 1980.

On April 23, 1980, the United States District Court for the Eastern District of Louisiana granted leave to proceed without prepayment of fees or costs, or of having to post security therefor.

The opinion of the Supreme Court of Louisiana is reported at 381 So.2d. 1227 (1980), and 377 So.2d. 1254 (1979), both cases are entitled Barksdale v. Blackburn. The opinion of the Honorable Matthew S. Braniff, Criminal district Court, Parish of Orleans, State of Louisiana is not reported, however, a copy of the court's judgment is attached, marked ' Exhibit "C" .

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 12, 1981. Therefore, this petition for Certiorari is thereby timely filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254 (C).

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment V:

"...nor be deprived of life, liberty, or property, without due process of law..."

Constitution of the United States Amendment XIV:

STATUTORY PROVISIONS

Federal Rules of Appellate Procedure, 4, 4 (a), 28 U.S.C.A. discussing the timeliness of the Notice of Appeal, and the request for extension of time for filing the notice of appeal made after expiration of the thirty day period following be made by motion.

STATEMENT OF THE CASE

Petitioner, Woodrow Barksdale, II, was charged by the state with attempted simple burglary, a violation of LSA-R.S. 14:62 (27). He pled guilty to the offense on February 11, 1977 in the Criminal District Court for the Parish of Orleans. Subsequent to his conviction he was adjudicated a fourth felony offender and on April 1, 1977, he was sentenced to serve eight (8) years' imprisonment without benefit of good time pursuant to R.S. 15:571.3 (C).

After conviction and sentencing petitioner filed application for a writ of habeas corpus, alleging that the pleas of guilty entered on June 6, 1971, absent a showing that those pleas were know-

ing, and intelligently entered, those convictions could not serve to enhance the penalty under Louisiana's H.F.C. Statute.

Secondly, petitioner contended that the retroactive application of LSA-R.S. 15:571.3 (C) which denied good time on his sentence is ex post facto since it increases his punishment and makes more severe than it would have been prior to the effective date of the law, and that his sentence under the privisions of the newly enacted law is violative of the ex post facto clause of the United States Constitution.

Finely, petitioner contended that the multiple bill hearing held on February 17, 1977, there was in fact a controversy and/or question as to whether ornot one of the 1971 convictions, i.e., a marijuana conviction was a misdemeanor or felony in 1971; however, the marijuana conviction was used to enhance sentence. Subsequently, in a habeas corpus proceeding petitioner attached the sentence based upon the fact that the 1971 conviction was a misdemeanor and was illegally used to enhance his sentence. On November 28, 1978, the court determined that the marijuana conviction was indeed a misdemeanor, but affirmed its judgment of eight years, as being within the statutory limits, denying petitioner procedural due process.

Petitioner appealed this denial of the state trial court of November 29, 1978 to the Louisiana Supreme Court in which that court upheld the trila court's judgment. Barksdale v. Blackburn, 377 So.2d. 1254 (1979); Barksdale v. Blackburn, 381 So.2d. 1227 (1980), (one justice dissented from the denial of the writ)

Petitioner, after exhausting all available state court remedies filed habeas corpus applications in the United States District court for the Eastern District of Louisiana on April 23, 1980 which was referred to the United States Magistrate for report and recommendation on May 12, 1980. The United States Magistrate, James D. Carriere, dismissed the petition on August 8, 1980, thereafter, petitioenr in proper person, filed notice of appeal and application for certificate of probable cause to appeal to the United States Court of appeals for the Fifth Circuit.

Pursuant thereto, on September 18, 1980, the United States District Court issued the certificate of probable cause to appeal.

Thereafter, petitioner in November, 1980, submitted his original brief to the court of Appeals. The Fifth Circuit court of Appeals on June 12, 1981, dismissed the appeal "...Because the notice of Appeal was not timely filed, and because such filing is indispensable to our exercise of jurisdiction, we must dismiss the appeal...."

In addition to the foregoing, the court stated that even though the United States District Court accepted the Notice of appeal and granted probable cause to appeal on September 18, 1980, the appeal would be dismissed because petitioner did not make a request to file the appeal out of time, or offer any excuse for the late filing of the notice of appeal.

REASONS FOR GRANTING THE WRIT

Petitioner shows certain elements in his case to be undisputed, therefore, considering the following facts his writ of certiorari should be granted:

On August 8, 1980, the United States District Court dismissed petitioner's habeas application. Therefore, petitioner had one month from the date of this judgment to file his notice of appeal. The Notice of Appeal was post marked September 5, 1980, (within the time limitation allowed for filing such notice) however, the notice was not received until September 9, 1980, one day after the expiration date for filing the notice.

Petitioner contends that thenotice was not submitted late. On or about September 3rd or 4th, 1980, the notice was deposited in the United States mail for prisoners use here at the Louisiana State Penitentiary. According to the Circuit court the notice was post marked September 5, 1980, and received September 9, 1980 one day after expiration time for filing. Subsequent to this the court granted probable cause to appeal to the Fifth Circuit Court of Appeals, Petitioner states that since the district court granting of probable cause to appeal was rendered September 18, 1980, and the unequivocal fact that the district court did not send or forward to

any documents of any sort that indicated his notice was filed untimely, quite the contrary, the court accepted the notice of appeal and granted probable cause to appeal.

It must be remembered, that petitioner mailed the notice of appeal 4 or 5 days ahead of time, and if the notice had not been received timely, then, the district court would have denied petitioner leave to so proceed, and then, having been put on notice petitioner could have requested permission of the circuit court to file the notice of appeal within the second thirty day period for filing the late notice. However, petitioner had no reason to believe that the notice was not timely.

QUESTIONS PRESENTED

1) Whether the court erred in its determination that, because petitioner did not file for relief from the untimely notice his appeal should have been dismissed?

2) Whether the granting of the certificat of probable, and the acceptance of the notice of appeal in the district court relieved petitioner of any fault, if the notice was in fact untimely?

3. Whether the court lacked jurisdiction to hear the appeal in this case?

ARGUMENT

Question 1):

Here the factors to be considered by the court is primarily that petitioner had no reason to file a motion for excusable neglect in the district court in the court of appeals. It is very clear that the district court did not notify petitioner that it would not accept the notice of appeal. The Court of Appeals in dismissing the appeal held "...Barksdale has made no motion for relief from the untimely notice in the district court nor in this court..."

Should petitioner be held at fault here, when it is actually not his fault the district court processed the notice and granted probable cause? Certainly not. For if the district court had not accepted the notice for being untimely, petitioner submits he would have promptly filed the motion for excusable neglect. Besides, as it stands, petitioner had no reasons for making such a request, since he did in fact mail his notice far within the time specified in FRAP Rule 4 (a), and the subsequent granting of probable cause

gave him even less reason for even thinking of the mere possibility of the notice being untimely, for the court had accepted the notice and processed the case.

In addition, petitioner further contends that he deposited the notice of appeal on or about the 3rd or 4th of September, 1980, in the United States mail box placed at different locations for prisoners use here at the Louisiana State Penitentiary. Petitioner states he is not responsible for the inadequacies in the United States mail or the administration here at the prison in regards to the handling of prisoner's mail. There is less than 100 miles from the Louisiana State Penitentiary to the United States Court of Appeals for the Fifth Circuit in New Orleans, Louisiana, therefore, From September 3rd or 4th 1980, through September 8, 1980, was indeed ample time for the notice to reach its destination.

Petitioner it is submitted, is surley not at fault when viewing the totality of the circumstances and facts presented here, and should be excused of any fault attributed to him, any fault, if there be any, lies in the district court's accepting the notice and granting probable cause to appeal.

Petitioner presents the case of Evans v. Jones, cited as 366 F.2d. 773 (1966), that bears similarities to the instant case, where the fourth Circuit held, "...although the filing was only one day late, well within the permissible extension of thirty days if the district court determines that the neglect if any, was excusable." Furthermore, the court states, "..A finding by the district judge that the delay in filing was excusable will validate a late filing provided the effect is not to extend the time for filing more than thirty days from expiration of the original thirty day period." The court remanded the case for a determination whether there was excusable neglect. Although, this case discusses Rule 73 (a) the principles are the same when considering petitioner's fact situation.

Question 2):

This case presents the question whether the district court's grant of a Certificate of probable cause for appeal, and acceptance of the notice of appeal will be viewed in the light, that is, the granting of probable cause to appeal could or should only be construed to mean that petitioner was excused for the untimely filed notice. Because he was never informed otherwise by the district court and considering these facts which is uncontested for the record will affirmatively show that the district court did not notify petitioner that his notice of appeal was in fact late in arriving.

In addition, petitioner first time hearing that the notice was late was when the United States Court of Appeals for the 5th Circuit dismissed his appeal. Therefore, it is submitted, that when petitioner finally heard of the late filing, it was surely too late to submit a motion for excusable neglect. Accordingly, it is submitted, that from these facts petitioner is being denied his due process rights to the United States Constitution. Petitioner contends that in viewing all pertinent facts, he is not to be held responsible for the indecision of the United States District Court for not notifying him in order that he could have known his next step would be to file the motion for excusable neglect in accordance with the applicable rules.

Although, the court felt it must dismiss petitioner's appeal because such filing is indispensable to their exercise of jurisdiction, petitioner states that the court was in total error and should have heard the appeal. Our jurisprudence is quite clear that when it comes to the filing of a notice of appeal, and that it is a jurisdictional prerequisite to the hearing of the appeal, however, in the instant case, the question is on the one hand whether petitioner's notice according to the district court was filed timely, or that the district court took upon itself to excuse petitioner one date late notice, or whether because the court did not forward to petitioner any notification that he was late in filing,

the court of appeals erred in not considering these facts and in not considering such dismissed petitioner's appeal, erroneously, and without due process of law. It is further submitted, that the United States District Court did sanction petitioner's Notice of Appeal as timely and subsequently on September 18, 1980, the court also granted certificate of probable cause for appeal, these facts can only be construed to mean without any indication adversely affecting such, e.g., notifying notice was not timely filed, that petitioner was without any reason to doubt that his appeal would be hot be heard.

Question 3):

Since the timely filing of a notice of appeal is a jurisdictional prerequisite to the hearing of the appeal, the United States Court of Appeals for the Fifth Circuit, thus felt powerless, and in conclusion felt it had to dismiss the appeal.

It is quite clear that if the court view the notice of appeal as untimely and not considering the negligence contributed by the district court in its faulure to notify petitioner so that he can file a motion on excusable neglect, thus the court of appeals is arbitrarily denying petitioner full due process of law.

Therefore, it is submitted because of the district court error petitioner is made to suffer, to the point where he is forced to abondon his constitutional rights. The court is quite right when it states: "because the notice was late, and such filing is indespensable to its exercise of jurisdiction" but coupled with the facts of the instant case the court did have standing jurisdiction to review the appeal.

WHEREFORE, the above and foregoing considered, petitioner prays that a writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit reversing the judgment complained of.

Respectfully submitted,

Woodrow Barksdale, II

WOODROW BARKSDALE, II

CERTIFICATE AND PROOF OF SERVICE

I, WOODROW BARKSDALE, II, do hereby certify that a copy of the foregoing petition of Certiorari has this day been mailed, postage prepaid, to the defendant, Frank C. Blackburn, Warden, Louisiana State Penitentiary, Angola, Louisiana, 70712.

Woodrow Barksdale II

WOODROW BARKSDALE, II
PMB#084275 Ash -2-
Louisiana State Penitentiary
Angola, Louisiana 70712

SWORN TO AND SUBSCRIBED before me a Notary Public this 17th day of July 1981.

O A McKeithen

O A McKEITHEN, Notary Public

APPENDICES

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA.
SEP 9 2 54 PM '80
NELSON B. JONES
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

WOODROW BARKSDALE, II	CIVIL ACTION
Versus	NUMBER 80-1364
FRANK BLACKBURN, WARDEN	SECTION "H" (2)

NOTICE OF APPEAL

MAY IT PLEASE THE COURT:

Petitioner WOODROW BARKSDALE, II, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the judgment rendered against him in the United States District Court for the Eastern District of Louisiana, on August 7, 1980 dismissing his application for heabeas corpus relief.

Respectfully submitted,

WOODROW BARKSDALE, II
PMB#084275 Oak -4-
Louisiana State Penitentiary
Angola, Louisiana 70712

DATED: August 29, 1980

Fee
Process
x Charge KDS
Index
Order
Hearing
Document No.

EXhibiT

Woodrow BARKSDALE, II,
Petitioner-Appellant,

v.

Frank BLACKBURN, Warden,
Respondent-Appellee.

No. 80-37[illegible].
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit A

June 12, 1981.

Louisiana prisoner sought habeas corpus relief. The United States District Court for the Eastern District of Louisiana, Adrian G. Duplantier, J., denied relief and petitioner appealed. The Court of Appeals held that notice of appeal was not timely filed and the *Sanchez* exception was not available.

Appeal dismissed.

Habeas Corpus ⇐113(6)

Sanchez exception to rule precluding granting of relief from untimely filing of notice of appeal was not applicable where although untimely notice of appeal was filed within one-month grace period created by *Sanchez*, petitioner made no motion for relief either in district court or in Court of Appeals, and district court's grant of certificate of probable cause for appeal would not be treated as an implicit finding of excusable neglect as neither question of timeliness of filing nor excuse for late filing was raised below. F.R. A.P. Rules 4, 4(a), 28 U.S.C.A.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEE, RUBIN and RANDALL, Circuit Judges.

PER CURIAM:

A Louisiana prisoner serving an eight-year sentence in the state penitentiary at Angola for simple burglary enhanced by two prior felony convictions seeks habeas corpus. Because the notice of appeal was not timely filed, and because such filing is indispensable to our exercise of jurisdiction, we must dismiss the appeal.

The district court's order dismissing the habeas petition was filed August 8, 1980. The notice of appeal was mailed on September 5, 1980, but was not received by the district court until September 9, 1980, one day after the end of the period for filing a notice of appeal under Fed.R. App.P. 4(a).

In the past we have permitted reliance on the normal course of mail delivery to excuse an otherwise untimely filing of notice of appeal. However, as we pointed out in *Sanchez v. Board of Regents of Texas Southern University*, 625 F.2d 521 (5th Cir. 1980), Fed.R.App.P. 4 was amended in 1979 and it now precludes the granting of relief from an untimely filing unless a motion to excuse the delay is itself made no later than thirty days after the expiration of the period prescribed in Rule 4(a) for filing a notice of appeal, that is, within sixty days from the date of judgment.

Under the preamendment case law, we permitted the request for relief from a tardy filing of notice of appeal to be made for the first time in this court even after the expiration of a second thirty

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EXHIBIT "A"

day period following the original thirty day filing period provided by Rule 4(a). We treated the late-filed notice of appeal as a motion to extend the time for filing. In *Sanchez* the tardy filing occurred after the effective date of the amendment to Rule 4. The appellant moved this court to remand to the district court to determine whether the tardy filing resulted from excusable neglect. Relying on the preamendment jurisprudence, we there remanded to the district court for a finding on the excusable neglect issue despite the fact that the motion for relief from untimely filing was made for the first time in this court and, apparently, after the expiration of the thirty day period following the period prescribed by Rule 4(a) for filing the appeal notice. We made the *Sanchez* exception applicable only to tardy notices of appeal filed within thirty days of the date of that decision.

Barksdale's untimely notice of appeal was filed within that one month grace period created by *Sanchez*. However, Barksdale has made no motion for relief from the untimely filing of the appeal notice either in the district court or in this court. We cannot construe the district court's grant of a certificate of probable cause for appeal, filed September 18, 1980, as an implicit finding by that court of excusable neglect in the tardy filing of the notice of appeal, for neither the question of timeliness of filing nor that of an excuse for failure to file timely was presented to the district court. Because Barksdale has not moved for relief from the untimely filing, the *Sanchez* exception is not available in this case.

Accordingly, bound by the 1979 amendment to Rule 4, Fed.R.App.P., and our interpretation of it in *Sanchez*, we DISMISS the appeal.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-3782

U.S. COURT OF APPEALS
FILED
JUN 29 1981
GILBERT F. GANUCHEAU
CLERK

WOODROW BARKSDALE, II,

Petitioner-Appellant,

versus

FRANK BLACKBURN, Warden,

Respondent-Appellee.

- - - - -

Appeal from the United States District Court for the Eastern District of Louisiana

- - - - -

ON PETITION FOR REHEARING

(JUNE 29, 1981)

Before GEE, RUBIN and RANDALL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ ALVIN B. RUBIN
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF LA
AUG 8 4 49 PM '80
NELSON B. JONES
CLERK

WOODROW BARKSDALE, II — CIVIL ACTION

versus — NUMBER 80-1364

FRANK BLACKBURN, WARDEN — SECTION "H" (2)

ORDER

The Court, after carefully considering the petition, the records, including the state court record, the law applicable to the case, and the Magistrate's Report and Recommendation, hereby approves the Magistrate's Report and Recommendation and adopts it as its opinion herein. Accordingly,

IT IS ORDERED that the petition of Woodrow Barksdale, II for habeas corpus relief is DISMISSED.

New Orleans, Louisiana, this 7th day of August, 1980.

UNITED STATES DISTRICT JUDGE

EXHIBIT "B"

FEE
PROCESS
x CHARGE 105
INDEX
ORDER
HEARING
DOCUMENT No. 7

DATE OF ENTRY AUG 11 1980

Supreme Court of Louisiana

NEW ORLEANS, 70112

December 8, 1978

STATE OF LOUISIANA EX REL
WOODROW BARKSDALE

VS.

MATTHEW S. BRANIFF, JUDGE,
CRIMINAL DISTRICT COURT, PARISH
OF ORLEANS

NO. 63,215

In re: Woodrow Barksdale applying for Writ of Mandamus, Parish of Orleans

---

Writ denied. Mandamus application moot, since the trial court acted on November 30, 1978.

ATJR

JWS

FWS

JAD

PFC

WFM

JLD

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Clerk's Office
Supreme Court of Louisiana
New Orleans
December 8, 1978

Clerk of Court

EXHIBIT "C"

Supreme Court of Louisiana

NEW ORLEANS, 70112

STATE OF LOUISIANA EX REL
WOODROW BARKSDALE

No. 66,904

VS

ORLEANS CRIMINAL DISTRICT
COURT, SECTION "B"

In Re: Woodrow Barksdale, applying for writ of mandamus, Parish of Orleans, No. 254-966.

May 19, 1980

Granted. If the trial judge has not already acted on relator's January 10, 1980 petition, he is ordered to do so, forthwith.

JAD

PFC

WFM

FAB

JCW

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Supreme Court of Louisiana
New Orleans
May 19, 1980

Clerk of Court

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

NUMBER: 254966

SECTION: B

STATE OF LOUISIANA

VERSUS

WOODROW BARKSDALE

FILED: DY CLERK

JUDGMENT

THE APPLICATION IS DENIED.Act 457 of 1970, eggective July 29,1970 makes the conviction in case number 220-269 a misdemeanor. SEE: Act 457 of 1970(RS) section 971(c)(d)(1):CCRP933(4).

The sentence of 8 years is within the statutory limits within the discretion to impose by the Court. State v Pierson,296 S2d 324(197

The applicant was convicted on a guilty plea(SEE: Art 934(3)CCRP and presents no facts to warrant the exercise of the Court's discretio to convene a evidentiary hearing. SEE: Rule 27 Louisiana Supreme Court State v Valentine 254 S2d 450(1971)

New Orleans, La. 28th day of Nov., 1978

Matthew J. Bonnie Jr.
JUDGE

Woodrow Barksdale PMB 84275
LSP Angola, La. (70712)

Hon. Frans J. Labranche,jr.
Clerk of the Supreme Court
301 Loyola Ave.
NOLA(70112)

FILED Nov 22 1978
Sec. "B"
Deputy Clerk

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Deputy Clerk
Criminal District Court
Parish of Orleans

EXhibit

Best Copy Available

CRIMINAL DISTRICT COURT NUMBER:254-966

PARISH OF ORLEANS

STATE OF LOUISIANA SECTION: B

STATE OF LOUISIANA
VERSUS
WOODROW BARKSDALE

FILED: DY CLERK:

JUDGMENT

Applicant seeks,not to invalidate his plea of guilty,but attacks the validity of the enchanced penalty for the reason that in another section,"F", on June 6,1971 he entered a plea of guilty to the felonies used asa basis for enchancment in this cause. Applicant contends his pleas on June 6,1971 cannot be used as a basis for enchancment as a multi offender and draws a conclusion that the sentence by thisCourt is illegal.

Finding of fact

1. The plea of guilty was entered in Section F,with the assistance of counsel on June 6,1971;
2. Case number 220-365 and 220-636,section F are felonies involving respectfully,simple burglaries.
3. In Boykin v Alabama,89 Sct. 1709(1969) the record wassilent as to any canvassing by the Court; the transcript exhibit attached to applican motion clearly indicates:
   1. presence of mother of 17 year old defendant;
   2. a great length discussion between competent & experience d counsel with the mother and applicant;
   3. Aided by his counsel and mother applicant informed the court hispleas were free of pressure,threats,or promises;
   4. the transcript vividly demonstrates a plea bargain was entered into by the Court,the State and applicant and the plea bargain waskept and executed;
   5. The court,section F, informed applicant of his right to a trial by jury,and right to appeal;
   6. The sum total of the circumstances evidenced by the transcript,cold asit may be,clearly demonstrates the applicant,aided by his mother and counsel,knew what he was doing,knew what he was going to get as sentences,and for and in consideration of the sentences he gave up his Boykinazitation rights.

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Criminal District Court
Parish of Orleans
Deputy Clerk

3. The Court finds that the rule of State v Lewis,357 S2d 1155,(1979) is not applicable since the reconstruction of what happened in 1971 is easily gleaned from the transcript furnished by the applicant.

ORDER

The application is denied. State v Valentine,254 S2d 450(1971); State ex rel Jackson v Henderson,255 S2d 85(1971 applicable only to Guilty pleas taken after Dec. 8,1971-State v Henderson,259 S2d557(1972)

New Orleans La. 26th day of July ,1979

Judge

Woodrow Barksdale
#4275 Oak 4
Angola,La (70712)

Opposition

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81 5134

WOODROW BARKSDALE, II,
Petitioner

VS.

FRANK C. BLACKBURN, WARDEN,
LOUISIANA STATE PENITENTIARY,
Respondent

Memorandum In Response To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL OF LOUISIANA

HARRY F. CONNICK,
DISTRICT ATTORNEY FOR THE
PARISH OF ORLEANS

J. KEVIN McNARY,
ASSISTANT DISTRICT ATTORNEY
FOR THE PARISH OF ORLEANS

619 South White Street
New Orleans, Louisiana 70119
Tele: (504) 822-2414, Ext. 606

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81 5134

WOODROW BARKSDALE, II,
Petitioner

Vs.

FRANK C. BLACKBURN, WARDEN,
LOUISIANA STATE PENITENTIARY,
Respondent

Memorandum In Response To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

STATEMENT OF THE CASE

Petitioner, Woodrow Barksdale, II, is a State prisoner currently incarcerated at the Louisiana State Penitentiary in Angola, Louisiana. On February 11, 1977, he entered a plea of guilty, in the Criminal District Court for the Parish of Orleans, to attempted simple burglary, a violation of La. R.S. 14:27(62). He was subsequently adjudicated a fourth offender and was sentenced, pursuant to the provisions of La.R.S. 15:529.1, to eight years imprisonment without benefit of parole, probation or suspension of sentence. After unsuccessfully pursuing habeas corpus relief in the State Courts, petitioner sought habeas corpus relief in the United States District Court for the Eastern District of Louisiana. The order of the District Court dismissing petitioner's application was entered on August 11, 1980. Petitioner's notice of appeal was filed on September 9, 1980. The United States Court of Appeals, Fifth Circuit, held that, since the notice of appeal was not filed until September 9, 1980, more

than thirty days after the date on which the District Court's order was filed*/, it was not timely. Fed.R.App.P. 4 (a). Barksdale v. Blackburn, 647 F.2d 630 (5th Cir. 1981). The court further found that, because petitioner had failed to file a timely motion to excuse the delay, as required by Rule 4(a)(5), he could not perfect his appeal. 647 F.2d at 631; see also Sanchez v. Board of Regents of Texas Southern University, 625 F.2d 521 (5th Cir. 1980).

ARGUMENT

Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides, in pertinent part:

> "In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from. . . [Emphasis supplied]

Respondent respectfully suggests that the appropriate date from which to measure this thirty day period is not, as the Court of Appeals opines, the date of filing of the Order but, rather, its date of entry. The Federal Rules of Civil Procedure provide that:

> ". . . The entry of an order or judgment shall show the date the entry is made. . ."
> Rule 79, F.R.C.P.

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*/ August 8, 1980.

The Order of the District Court dismissing petitioner's application for habeas corpus indicates, in the lower left-hand corner, that the date of entry was August 11, 1980. Petitioner's notice of appeal, filed on September 9, 1980, was thus timely. While continuing to gainsay the substantive allegations of petitioner's application for habeas corpus as wholly without merit, Respondent nevertheless feels an obligation, as an officer of the Court, to point out that petitioner's notice was timely filed, thereby entitling him to an appeal herein.

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CERTIFICATE

I certify that a copy of this Memorandum has been served upon petitioner by placing a copy of same in the United States Mail, postage prepaid, addressed to:

Woodrow Barksdale, II
P.M.B. #084275 - Ash 2
Louisiana State Penitentiary
Angola, Louisiana 70712